

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL TODD DUNNUCK,

Defendant-Appellant.

UNPUBLISHED

June 24, 2008

No. 278328

Cass Circuit Court

LC No. 05-010400-FC

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals by right¹ his sentence of 15 to 25 years in prison imposed on his plea-based conviction of second-degree murder, MCL 750.317.² We affirm.

Defendant challenges the scoring of offense variable (OV 3) of the judicial guidelines that are applicable to defendant's March 7, 1990, murder of William Whittaker. We review a sentence imposed under the former judicial sentencing guidelines for an abuse of discretion. See *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. The misscoring of sentencing variables under the judicial sentencing guidelines does not necessarily justify a remand. *People v Mitchell*, 454 Mich 145, 175, 177; 560 NW2d 600 (1997). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.* at 177. This Court will uphold scoring decisions under the judicial sentencing guidelines if evidence exists in the record to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993) abrogated on other grounds by *Mitchell*, *supra*.

¹ Defendant filed an application for leave to appeal from his plea-based conviction, but this Court ordered that the application be treated as a claim after finding that defendant had an appeal of right. Defendant committed the crime before December 27, 1994, and requested counsel within 42 days of sentencing. See *People v Kaczmarek*, 464 Mich 478; 628 NW2d 484 (2001).

² Defendant entered his plea after his first trial ended in a hung jury.

Under the judicial sentencing guidelines, a court should assess 25 points under OV 3 where there was “[u]npremeditated intent to kill; or intent to do great bodily harm; or creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.” Michigan Sentencing Guidelines (2d ed), p 77. But the court should assess ten points where a killing was intentional, “but the death occurred in a combative situation or in response to victimization of the offender by the decedent.” *Id.*

Defendant contends that the trial court abused its discretion when it scored OV 3 at 25 rather than 10, because there was evidence in the record that the decedent victimized him sexually when he was growing up. Defendant shot the victim once in the forehead with a rifle at close range. During his plea, defendant testified that he went to Whittaker’s trailer to confront him “in regards to years of sexual abuse” and that the two got into an argument. Defendant picked up a gun that was in the trailer and shot Whittaker.

Defendant made a similar admission in his description of the offense in the presentence investigation report. There, he first maintained that he went to Whittaker’s trailer to confront him about years of abuse. However, he then stated that he saw Whittaker at a neighbor’s home the day before the shooting and that Whittaker touched him, which upset him. Defendant went to Whittaker’s home the next day to confront him. As the two spoke, defendant became angry and grabbed a rifle from the sofa. Whittaker said, “What are you going to do with that you faggot, its not even loaded.” Defendant shot Whittaker and left the trailer with the rifle, which he then placed in a dumpster before returning to the home to call the police and claim that he had found Whittaker’s body. This version differed from the one that defendant allegedly told his friends. According to a prosecution witness, defendant maintained that Whittaker had molested defendant’s stepbrother and that the shooting occurred after defendant confronted Whittaker about the abuse, and Whittaker tried to molest defendant.

The trial court discussed whether ten points would be appropriate, but it did not appear to credit defendant’s assertions: “He has now come forward with his explanation of how that happened, but that’s just defendant’s version.” During the imposition of sentence, when it decided to sentence defendant within the plea agreement, the trial court stated that there was “plenty of other circumstantial evidence” to support some claims defendant was making, and that Whittaker “may well have victimized” defendant. But it also found that defendant “essentially executed” Whittaker, and that defendant could have reported any sexual abuse rather than taking the law into his own hands.

The trial court’s decision to score OV 3 at 25 was not clearly erroneous. Defendant’s admissions during his plea and in the sentencing report support the trial court’s finding that defendant had the specific intent to kill or to cause great bodily harm when he shot Whittaker. Defendant’s versions of the alleged molestation and the murder were inconsistent. Moreover, the murder does not appear to have been in response to a recent victimization—if any such victimization occurred at all.

In addition, even if defendant had established a scoring error, he still would not be entitled to relief. His sentence was proportionate, and did not constitute an abuse of discretion. The trial court sentenced defendant in conformity with the plea agreement, which provided for a maximum sentence of 25 years and a minimum sentence at the discretion of the trial court. The crime defendant committed, no matter what the motivation, was very serious. The sentence

defendant received is relatively light, especially considering that defendant concealed the crime for a long time. There was no error warranting sentencing relief. *Mitchell, supra* at 175, 177; *Raby, supra* at 496.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto